IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.12.2006

CORAM :

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

Second Appeal No. 677 of 1996

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1. Vella Gounder
2. Subbanna Gounder
3. Komarappa Gounder
4. Marappa Gounder
5. Shanmugam
6. Duraiswamy .. Appellants/Plaintiffs

Versus

Arulmighu Nageswaraswamy Temple
Kondalam
rep. By the Executive Officer
Arulmighu Magudeeswarar Veera
Narayanaperumal Koil by the
Executive Officer
Kodumudi, Thirukkoil
Kodumudi .. Respondent

Appeal under Section 100 CPC against the decree and judgment dated 17.10.1995 made in A.S. No. 153 of 1994 on the file of Principal District Judge, Periyar District at Erode confirming the decree and judgment dated 02.09.1994 made in O.S. No. 589 of 1993 on the file of II Additional District Munsif, Erode.

For Appellants : Mrs. Mythili Suresh
for M/s. Sarvabhauman Associates
For Respondent : Mr. S.K. Nachimuthu

JUDGMENT

The unsuccessful Plaintiffs are the appellants in this second appeal, who have filed O.S. No. 589 of 1983 before the II Additional District Munsif, Erode for bare injunction, which was dismissed. As against the same, the appeal filed by them in A.S. No. 153 of 1994 on the file of Principal District Judge, Erode was also dismissed, hence the present second appeal has been filed.

2. It is claimed by the appellants herein that the Poojari of the respondent/temple has received Rs.1,400/- and executed a (உழுவை போக்கியம்) Usufructory mortgage Ex.A1 dated 04.04.1944 in favour of their predecessors and they agreed to pay Rs.50/- for performing the (படித்தரம் பூஜை) Pooja every year to Arulmighu Nageswaraswamy Temple Kondalam as mentioned therein. The land covered under Ex.A1 is to a

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extent of 11 acres 86 cents comprised in Survey No.103, Re-survey No.186/1 and 2 in Kondalam Village, Kodumudi, Erode Taluk, thus, the appellants predecessors and the appellants have been in possession and enjoyment of the suit property. The respondent threatened to bring the suit property in public auction for lease, hence, the suit was filed.

3. The case of the respondent is that Ex.A1 was not at all executed by the temple authorities, but said to have been by one Poojari, who is not a competent or authorised person to execute the same; that the appellants have not even paid the paltry amount of Rs.50/- which they stated to have agreed to pay towards performance of (படித்தரம் பூஜை) Pooja and in view of the fact that the appellants possession is not lawful, they are not entitled to the relief of injunction and that no injunction can be granted against the lawful owner.

4. Before the trial court, the appellants have marked Exs. A1 to A10 and examined the third plaintiff as PW1. The respondent neither marked any documents nor examined witness on their side.

5. Considering the oral and documentary evidence, the trial court, pointing out the evidence of PW1 found that admittedly the temple is the owner of the property; that it is not established by the appellants as to whether the person executed Ex.A1 is competent to execute it; that Ex.A5 is in the name of Palani Gounder and the relationship of the appellants with him is not explained; that in Exs.A6 and A7, only Patta Number alone is found mentioned, but the Survey Number is not mentioned, hence, the same cannot be accepted; that though it is alleged in the pleadings that the temple authorities attempted to interfere in their possession, it was not established in the oral evidence. It is further pointed out by the trial court that the appellants also claimed protection under the Tamil Nadu Minor Inams (Abolition & Conversion into Ryotwari) Act 1963, hereinafter referred to as Act; that Section 44 of the Act says that if proceedings under this Act relating to any inam granted for the benefit of any religious, educational or charitable institutions or granted to any individual for rendering service to a religious, educational or charitable institution or for the purpose of rendering any other service it shall be presumed unless the contrary is proved that the inam consists not merely of a grant of the melvaram in the land but also the kudivaram therein; that Section 3 of the Act states that with effect on and from the appointed day and save as otherwise expressly provided in this Act, every minor inam, including all communal lands etc., and all rights interests created by Inamdar before the appointed day shall as against the Government cease and determine. Sections 8 and 9 provides for grant of ryotwari Patta. Sub-clause (1) states that every person who is lawfully entitled to the Kudivaram in an inam land immediately before the appointed day whether such person is an Inamdar or not shall with effect on and from the appointed day be entitled to Ryotwari Patta. Sub-Section 2 (1) states that (i) Where the land has been transferred by way of sale and the transferee or his heir, assignee, legal representative or person deriving rights through him had been in exclusive possession of such

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land (a) for a continuous period of sixty years immediately before the 1st day of April 1960, such person shall, with effect on and from the appointed day be entitled to a ryotwari patta in respect of that land (b) for a continuous period of twelve years immediately before the 1st day of April 1960, such person shall with effect on and from the appointed day, be entitled to a ryotwari patta if he prays a consideration to the Government in such manner and in such number of instalments as may be prescribed in an amount equal to twenty times the difference between the fair rent in respect of such land determined in accordance with the provisinos contained in the schedule and the land revenue due on such land. Admittedly, the plaintiffs ancestors did not purchase the property and that the properties were not transferred by trustee or Inamdar by way of sale, hence, the appellants are not entitled to protection under the Act; that in view of the fact that the appellants herein admitted the title of the temple, the relief of injunction cannot be granted against the true owner; that the appellants alleged that they have been cultivating the suit lands separately, hence, a single suit filed by them is not maintainable and ultimately dismissed the suit.

6. The first appelalte Court on consideration of the evidence on record found that the appellants admitted that the suit property belonged to the respondent/temple; that the Chitta and Adangal stand in the name of the temple, but the appellants claimed right only as Mortgagees under the (உழுவடை போக்கியம்) Usufructory mortgage; that the appellants have not established that the person who executed Ex.A1 mortgage deed is not competent to execute the same or he is an Inamdar, Trustee or Service holder of the temple; that admittedly the plaintiffs ancestors have not acquired the property by way of any sale but as a mortgagee, but not proved who executed Ex.A1, mortgage deed besides that no document was placed to show that the suit property was given to a service holder and in the absence of any sale in favour of the appellants, as contemplated under Sections 8 and 9 of the Act they are not entitled to protection under the said Act even. In this context, it is pointed out by the lower appellate Court that the admission of the appellants that the property belonged to the respondent/temple assumes importance; that the appellants have not produced any evidence to show that they are regularly paying the sum of Rs.50/- towards படித்தரம் பூஜை (Pooja) as stipulated in Ex.A1; that the case of the respondent in the written statement is that the appellants have not paid the said amount and after considering the above said facts, the first appellate Court dismissed the appeal confirming the decree and judgment passed by the trial court.

7. At the time of admission of this second appeal, the below mentioned substantial questions of law have been framed.

i) Whether the courts below are right in law in holding that Section 80 of CPC notice is required particularly when the defendant is neither a Government nor a public officer as per Section 80 CPC, especially in view of the decision reported in 1997 (1) Law Weekly 704?

ii) Whether the courts below in any manner are competent to function as Inam Abolition Tribunal

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and go into the question of title in a suit for bare injunction which is specifically barred under Tamil Nadu Minor Inams Abolition and Conversion into Ryotwari Act, 1963.

iii) Whether not the courts below erred in law in not drawing any adverse inference under Section 114 (g) of the Evidence Act, when the defendant has not gone into the box to prove their case?

8. Mrs. Mythili Suresh, learned counsel appearing for the appellants submitted that the suit is one for relief of injunction and the only factum to be considered is as to who is in possession of the suit property at the time of institution of the suit; that admittedly the appellants are in possession of the suit property, which is evident from Exs. A2 to A10 filed by them, while so, denying the relief of injunction by the courts below is untenable in law and prayed for allowing the second appeal.

9. Mr. Nachimuthu, learned counsel appearing for the respondent submitted that possession of the appellants in the suit property is not lawful; that in the absence of any plea of adverse possession, the injunction sought for by them against the true owner is untenable in law; that the appellants have not even paid the admitted amount of Rs.50/- per annum said to have been mentioned in Ex.A1; that the courts below also rightly pointed out that the appellants have not established that the person, who executed Ex.A1, mortgage deed is competent or authorised by the temple and in the absence of the same the possession of the appellants shall be deemed to be illegal. Considering the above facts, the relief of injunction sought for by the appellants against the real owner was rightly declined by the courts below and prayed for dismissal of the same.

10. This Court carefully considered the arguments of the counsel for both sides and perused the material records. The suit property belonged to the respondent/temple is not in dispute. It is the case of the appellants that they came into possession of the suit property pursuant to execution of Ex.A1 by a Poojari of the respondent temple but the appellants have not placed any evidence to show that the said Poojari is competent to execute it or he was authorised by the temple to execute it. It is the further case of the appellants that under Ex.A1 dated 04.04.1944, their predecessors obtained usufructory mortgage for Rs.1,400/-. In Ex.A1, the previous mortgage with one Sengoda Gounder is also mentioned, but no date is found mentioned therein. It is also not explained by the appellants that whether the said Sengoda Gounder is related to them or not. It is contended by the respondent that the mortgage is not valid in law since the person who executed it is neither a trustee nor a service holder.

11. The courts below pointed out that neither the appellants nor the respondent pleaded in the plaint or written statement about the right under the Tamil Nadu Minor Inams Abolition and Conversion into Ryotwari Act, 1963, however arguments were advanced. The first appellate Court pointed out that the appellants herein have alleged that they have become full owner of the property under the Act. An

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person claiming to be entitled to a kudivaram has to prove the same by virtue of any grant in his favour or in favour of his predecessors in interest and Kudivaram interest, being a peculiar concept, depending upon the status and grant only it could not be claimed to have been conferred by mere possession or cultivation of land by any length of time. Such right as a ordinary cultivating tenant, have got to be asserted or sustained or substantiated under the ordinary tenancy law.

12. Considering the oral and documentary evidence available on record, this Court is of the view that the appellants have not produced any grant in their favour. On the contrary, they claim that their ancestors obtained the property by way of usufructory mortgage only. Indeed, the appellants herein have admitted that the suit property belonged to the temple, the chitta and adangal of the suit property stands only in the name of the temple, but they seek injunction restraining the temple from interfering in their possession. No doubt, mortgagee is entitled to be in possession till the property is redeemed. As mentioned above, the appellants have not established whether the person who mortgaged the property is a Trustee or service holder of the temple. Just because of mortgage deed executed by some one, the appellants cannot seek injunction restraining the temple, which is admittedly the owner of the suit property. The courts below also pointed out that the appellants herein have not specifically pleaded adverse possession or even established that and they claimed right only as a mortgagee. So, even a long possession of the appellants would not prevent the respondent from taking action against them. The respondent, being the owner of the property is certainly entitled to initiate action as they intend including bringing it on public auction for lease.

13. Now, we look into the substantial questions of law framed in this second appeal. The learned counsel appearing for the respondent admitted that the respondent is not a Government, hence, the notice under Section 80 CPC is not necessary prior to filing of the suit thus the first substantial question of law is answered against the respondent.

14. In so far as the second question of law is concerned, the first appellate court pointed out that "though it is not pleaded either in the plaint or in the written statement that parties claim right under Minor Inam Abolition Act, arguments were advanced on the said question before the trial court and the trial court also given a finding on this point. Since the plaintiffs have alleged they become full owners of the property by operation of law, it is necessary to give a finding as to the right of the parties on and from the commencement of the Minor Inam Abolition Act", thus it is evident that without pleadings the appellants herein have claimed benefits under the Act. The courts below dealt with the issue as to whether the appellants herein proved that they are entitled to the benefits of the Act or not and considering the oral and documentary evidence came to the conclusion that the appellants herein have recklessly canvassed the said issue. Strictly speaking, an issue, which did not arise on the pleadings should not be determined without there being any pleadings and evidence on any aspect and a finding on the same would

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not be sustainable in the eye of law. In this context, it is relevant to refer to the decision of the Honourable Supreme Court reported in (Sita Ram vs. Radha Bai and others) AIR 1968 Supreme Court 534 wherein in Para No.11, it was held thus:-

> "11. ....In so observing, in our judgment, the learned Trial Judge determined an issue which did not arise on the pleadings of the parties. If the plaintiff's case as set out in the plaint be accepted, Gomti Bai knew that jewellery of the family was handed over by the plaintiff to Lachhmi Narain, and it was agreed between the contesting parties that the jewellery was to be retained by the plaintiff. No argument was apparently addressed before the High Court on the case which appealed to the Trial Court. There was no specific plea raised in the Trial Court on that part of the case, and the parties did not go to trial on that issue. Again, unless the parties were proved to be in pari delicto the plea that the action instituted by the plaintiff was not maintainable cannot succeed."

15. The appellants herein have canvassed benefits under irrelevant Act to take shelter. Indeed, the courts below gave a finding that the appellants cannot take shelter under the Act, which is not canvassed by them in their pleadings, which is perfectly valid thus the second substantial question of law is answered against the appellants.

16. The third question of law is whether the Courts below erred in not drawing an adverse inference against the respondent as per Section 114 (g) of Evidence Act is concerned, it is not at all relevant to this case since the respondent has not hidden anything however, it is well settled that the plaintiffs, who filed the suit have to prove their case and they cannot rely on the weakness of the case of the defendant, thus, the said question of law is also answered against the appellants.

17. In view of the above discussions, this Court is of the considered view that the decree and judgment of the courts below are perfectly valid and interference of this Court is not warranted. The second is dismissed as devoid of merits. No costs.

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Asst. Registrar

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Sub Asst.Registrar

To

1. The Principal District Judge
   Periyar District
   Erode

2. The II Additional District Munsif
   Erode

3. The Section Officer
   Vernacular Records Section
   High Court
   Madras - 600 104

1 CC TO M/S SARVABHAUMAN ASSOCIATES, SR 60820

1 CC TO MR.S.K.NACHIMUTHU, ADVOCATE SR 61121

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